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 7 BARRY COHEN, CHRIS COHEN (aka CHRISTENE COHEN), the F/V POINT LOMA and
 Claimant, F/V POINT LOMA Fishing Company, Inc.

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UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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DEL MAR SEAFOODS, INC.,

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Plaintiff,

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No. C-07-2952-WHA

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v.

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**DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER LIMITING
THE DEPOSITION OF CHRISTENE
COHEN PURSUANT TO FRCP 26(c)**

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BARRY COHEN, CHRIS COHEN (aka
CHRISTENE COHEN), *in personam* and,
F/V POINT LOMA, Official Number
515298, a 1968 steel-hulled, 126-gross ton,
70.8 foot long fishing vessel, her engines,
tackle, furniture apparel, etc., *in rem*, and
Does 1-10,

)

Date: January 24, 2008**Time: 8:00 a.m.****Place: Courtroom 9, 19th Floor**

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Defendants.

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Pursuant to Civil Local Rule 7-1 and Fed. R. Civ. P. 26(c), Defendants, Barry A. Cohen and Chris Cohen (the "Cohens"), the vessel F/V POINT LOMA (the "Vessel") and Claimant F/V Point Loma Fishing Company, Inc. (collectively, "Defendants"), submit this Motion for a Protective Order Limiting the Deposition of Christene Cohen ("Motion for Protective Order").

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INTRODUCTION

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The parties are in the midst of completing their discovery in this case. Prior to beginning discovery and upon ordering the release of the Vessel from seizure at Plaintiff's request, the court admonished the parties to be careful and limit the costs incurred. Defendants have heeded this

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1 instruction and limited their discovery to two depositions and narrowly tailored discovery
2 requests focused on the issues in the case; namely the amount allegedly owed under the
3 Promissory Note signed by the Cohens (the “Note”) and the wrongful arrest of the Vessel.
4 Plaintiff on the other hand, continues to abuse the discovery process and has noticed numerous
5 depositions and propounded extensive discovery requests, including a request for another survey
6 of the Vessel, well beyond the scope of this litigation. *See e.g.*, Declaration of Gwen Fanger in
7 Support of Motion for Protective Order. (“Fanger Dec.”), Ex. M, pages 2-3.

8 As Plaintiff is well aware, Del Mar’s exclusive dealings related to the transactions at issue
9 in this case are with Barry Cohen and not with his wife. *See e.g.*, Fanger Dec., ¶¶ 11-12 ; Exs. K
10 and L. Moreover, Plaintiff simply intends to embarrass and harass Defendants by seeking
11 irrelevant information related to their marital relationship as the basis for its wrongful foreclosure
12 of the Vessel. Any testimony regarding private communications between the Cohens during their
13 marriage are privileged and remain privileged to this day. Defendants’ alternative proposal that
14 Plaintiff’s prepare written interrogatories in lieu of her deposition in order to obtain non-
15 privileged, *relevant* information, if any, will minimize the undue burden on Mrs. Cohen by
16 forcing a deposition of limited admissibility for which she can not afford to miss work and for
17 which privileged information is primarily at stake.

18 FACTS

19 On December 6, 2007, Plaintiff noticed the deposition of Chris Cohen, a party in this case,
20 for Friday, January 11, 2008 in Scottsdale, Arizona, where Mrs. Cohen currently resides. Fanger
21 Dec., Ex. A. The deposition of Mrs. Cohen is one of six depositions that Plaintiff intends to take
22 in this case. *See* Fanger Dec., Exs. B-F. The deadline for the close of discovery is January 11,
23 2008, the same day as Mrs. Cohen’s deposition is scheduled to occur.

24 Plaintiff did not confer with Defendants prior to noticing Mrs. Cohen’s deposition. The
25 deposition is scheduled for a day on which she works and she can not afford to take an entire day
26 off of work for her deposition. Declaration of Chris Cohen in Support of Motion for Protective
27 Order, ¶4. Defendants informed Plaintiff on December 12, 2007, that much, if not all, of Mrs.
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1 Cohen's testimony is covered by the marital communications privilege and therefore, traveling to
2 Arizona to take what is likely to be a very limited deposition would be an unnecessary expense to
3 all parties. Fanger Dec., Ex. H. Mrs. Cohen's involvement in this case is limited to the fact that
4 she signed the Note and First Preferred Ship Mortgage (the "Mortgage") which Defendants have
5 offered to stipulate to. Fanger Dec., Ex. J. Moreover, Del Mar has had no dealings with her
6 related to the underlying transactions in this case and its sole dispute is with her husband, Barry
7 Cohen. *See e.g.*, Fanger Dec., ¶¶11-12; Exs. K-L.

8 In light of the considerable burden to Mrs. Cohen and the expense to all parties in taking
9 her deposition, Defendants proposed as an alternative that Plaintiff pose a reasonable number of
10 written interrogatories to Mrs. Cohen in order to solicit whatever non-privileged and relevant
11 information she has relating to this case. Fanger Dec., Ex. H. Plaintiff responded two days later
12 that, despite the limited testimony of Mrs. Cohen, it still intended to take her deposition and
13 proposed flying her to San Francisco. Fanger Dec., Ex. I.

14 Defendants have in good faith attempted to confer with Plaintiff and resolve this issue
15 without the need for a court order by asking Plaintiff to reconsider their intention to take Mrs.
16 Cohen's deposition and instead offered that Plaintiff pose up to 15 written interrogatories for
17 Mrs. Cohen to answer. Fanger Dec., ¶¶9-11, Ex. J. Nevertheless, Plaintiff has responded, after
18 outlining numerous questions that could serve as appropriate interrogatories, that it rejects our
19 offer. Fanger Dec., pages 1-2, Ex. M.

20 ARGUMENT

21 Defendants seek a protective order limiting the deposition of Chris Cohen to no more than
22 15 written interrogatory questions that she will answer under oath. The court has the discretion to
23 limit discovery upon a showing of good cause to "protect a party or person from annoyance,
24 embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). In particular,
25 the court can order that discovery be limited to certain methods. Fed. R. Civ. P. 26(c)(3). Here,
26 good cause exists to limit the deposition of Mrs. Cohen to written interrogatories to the extent 1)
27 most, if not all, of Chris Cohen's testimony that Plaintiff seeks to elicit is protected by the marital

1 communications privilege; 2) the deposition is not likely to lead to any discoverable or admissible
2 evidence; and 3) the deposition will cause an undue burden and expense that is not outweighed by
3 the limited utility of Mrs. Cohen's deposition and reasonable alternative of written
4 interrogatories.

5 I. Marital Communications Privilege Applies to Most if not All of the Testimony of
6 Chris Cohen.

7 Both California state law and federal common law recognize a marital communications
8 privilege that protects private communications between spouses from disclosure. *See* Cal. Evid.
9 Code §980; *see also U.S. v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004). Under California
10 law, confidential communications, both written and oral, made between spouses during a valid
11 marriage are protected from disclosure by either spouse both during and after the marriage. Cal.
12 Evid. Code §980; *see e.g.*, *Rubio v. Superior Court of Orange County*, 202 Cal. App. 3d 1343,
13 1347 (Ct. App. 1998). Similarly, under federal common law, the marital communications
14 privilege may be asserted by either spouse and covers confidential communications among
15 spouses made during a marriage. *Montgomery*, 384 F.3d at 1056. Moreover, under both
16 California statutory law and federal common law, there is a presumption of confidentiality for
17 communications among spouses and the burden is on the party opposing the claim of privilege to
18 show the communications are not confidential. Cal. Evid. Code §917 ("If a privilege is claimed
19 on the ground that the matter sought to be disclosed is a communication made in confidence in
20 the course of the ... husband-wife ... relationship, the communication is presumed to have been
21 made in confidence and the opponent of the claim of privilege has the burden of proof to
22 establish that the communication was not confidential"); *Montgomery*, 384 F.3d at 1056-1057.

23 Barry and Chris Cohen were married on August 24, 1994. Notably, they were married at
24 the time they signed the Note and Mortgage, which is the subject matter of this lawsuit. Thus, all
25 private communications between them regarding the issues in this lawsuit are privileged. Even if
26 they are presently separated, under the marital communications privilege, such private
27 communications remain privileged even after the marital relationship ends.

28 Plaintiff's purpose for taking the deposition of Chris Cohen is designed to harass

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1 Defendants and increase the costs in this case unnecessarily. Plaintiff alleges that the divorce
2 proceedings between the Cohens and their behavior towards each other motivated and formed the
3 basis for their decision seize the Vessel. Plaintiff ignored the fact that Barry Cohen made a
4 substantial, lump sum payment on the Note in the amount of \$175,000 and they failed to
5 undertake a reasonable inquiry into the ability of Barry Cohen to make payments, although not
6 due, under the Note. Rather, Plaintiff based their decision to seize the Vessel on hearsay and
7 speculation about the Cohens' marital relationship. Thus, Plaintiff's allegations regarding the
8 marital relationship of the Cohens are irrelevant as to whether Del Mar had a right to foreclose
9 under the Mortgage and is pure speculation.

10 Thus, as Plaintiff seeks testimony regarding the relationship between the Cohens and their
11 communications surrounding the issues in this case, the subject of Mrs. Cohen's deposition in its
12 entirety would be protected by the marital communications privilege or the attorney-client
13 privilege regarding their divorce proceedings. Moreover, any non-privileged, relevant
14 information could be obtained through written questions to Mrs. Cohen without the imposition of
15 the burden on her or unnecessary expense to all parties involved. Courts have granted protective
16 orders that prevent disclosure of many types of information, including privileged information.
17 *Phillips v. Byrd*, 307 F.3d. 1206, 1212 (9th Cir. 2002) (*citing KL Group v. Case, Kay, and Lynch*,
18 829 F.2d 909, 917-919 (9th Cir. 1987) (protective order granted to prevent disclosure of letters
19 protected under attorney-client privilege)). Thus, a protective order limiting the deposition to
20 written interrogatories directed at non-privileged, relevant information is appropriate.

21 II. The Deposition of Chris Cohen is Not Likely to Lead to Any Discoverable or
22 Otherwise Admissible Evidence.

23 The deposition of Mrs. Cohen is unlikely to lead to any discoverable or otherwise
24 admissible evidence that could not be obtained through interrogatories. Chris Cohen's only
25 connection to this lawsuit, as Plaintiff is well aware, is that she is a signatory on the Note. *See*
26 *e.g.*, Fanger Dec., Exs. K-L. Defendants have offered to stipulate that Mrs. Cohen signed the
27 Note and Ship Mortgage and that her signature on these documents is true and correct. Fanger
28 Dec., Ex. J. These are probably the only questions that could be asked that are not covered by a

1 privilege. Taking her deposition in Scottsdale, Arizona, or even San Francisco for that matter,
2 would create an undue burden on her (she cannot afford to miss work) and unnecessary expense
3 on all parties simply to get these admissions that can be stipulated to or through requests for
4 admissions or written interrogatories.

5 In addition, both Joe Cappuccio, the President of Del Mar Seafoods, Inc. and Joe Roggio,
6 its Controller, admit that they have had no business dealings with Mrs. Cohen related to this case.
7 Fanger Dec., Exs. K-L. Moreover, the limitations on Mrs. Cohen's testimony were fully
8 explained to Plaintiff. Fanger Dec., Exs. H and J. In fact, Defendants offered an alternative that
9 would allow Plaintiff to prepare written interrogatory questions to Mrs. Cohen in lieu of her
10 deposition while preserving its opportunity to obtain any *relevant*, non-privileged information
11 without the significant costs and burden in taking what is likely to be a very limited deposition in
12 Scottsdale, Arizona. *Id.* Although Plaintiff offered to split the costs of bringing Mrs. Cohen to
13 San Francisco for her deposition, she does not have the resources to travel and miss work. When
14 balancing the limited utility of her deposition against the undue burden to Defendants from the
15 potential disclosure of privileged information, taking Mrs. Cohen's testimony through a set of
16 written interrogatories is a reasonable alternative. Plaintiff's knowledge that Ms. Cohen has
17 virtually nothing to do with the dispute in this case, suggests that its purpose of noticing her
18 deposition is simply to harass, embarrass, and cause undue burden to her and Mr. Cohen.

19 III. A protective order is appropriate where the deposition of Mrs. Cohen will cause
20 undue burden and expense.

21 Plaintiff has noticed numerous depositions in this case despite the admonition by this Court
22 that the parties should not incur excessive costs and expenses. Defendants have adhered to this
23 instruction and have conducted a focused and reasonable amount of discovery. In fact,
24 Defendants have completed the depositions of the only two witnesses they intend to take. *See*
25 Fanger Dec., Exs. K-L. Defendants have also served a limited amount of discovery requests on
26 Plaintiff that were narrowly tailored to the facts in this case.

27 In contrast, Plaintiff has ignored the Court's instruction and noticed six depositions and
28 served extensive discovery requests well beyond the scope of this case. *See* Fanger Dec., Exs. A-

1 G, N-P (total of 45 requests for production of documents; 30 numbered interrogatories, not
2 including subparts, and 33 requests for admissions). In addition to the depositions of Barry and
3 Chris Cohen, Plaintiff has served deposition subpoenas on Barry Cohen's two sons, Michael
4 Cohen and Leonard Cohen, the captain of the F/V POINT LOMA, Dave Kobak, and Barry
5 Cohen's personal accountant, Dave Cantrell. *See* Fanger Dec., Exs. A through F and Ex. M.
6 Again, according to the testimony of Joe Cappuccio and Joe Roggio, Del Mar's exclusive
7 dealings with respect to the issues in this case are with Barry Cohen, and not with his wife.
8 Fanger Dec., Exs. K-L. Moreover, Plaintiff has also served a request to allow a surveyor to
9 inspect the Vessel despite the fact that the Plaintiff already disclosed numerous photos of the
10 condition of the Vessel that it had access to when it seized the Vessel. Exhibit G and M to
11 Fanger Dec., Exs. G, M and Q.

12 Balancing the limited utility of Mrs. Cohen's deposition, as described above, with the
13 significant burden to her and unnecessary expense, a protective order is justified. *See e.g.*, *U.S. v.*
14 *Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982) (recognizing Rule
15 26(c) provides safeguards for protection of parties in view of broad discovery rights under Rule
16 26 and may issue any order which "justice requires" to protect such party from undue burden or
17 expense).

18 THE PROPOSED PROTECTIVE ORDER

19 Defendants respectfully request that the Court issue a protective order limiting the
20 deposition of Chris Cohen. The proposed order would allow Plaintiff to pose up to 15
21 interrogatory questions in writing to Mrs. Cohen. Plaintiff itself has already identified the
22 questions to ask in such interrogatories. Exhibit M to Cohen Dec. The protective order would
23 allow Plaintiff to obtain *relevant*, non-privileged information, if any, and minimize the burden to
24 Mrs. Cohen.

25 CONCLUSION

26 For the reasons stated above, Defendants respectfully request that the court issue a
27 protective order limiting the deposition testimony of Mrs. Cohen to no more than 15 written
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1 interrogatories.

2 DATED this 18th day of December, 2007.

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5 Respectfully submitted,

6 /s/ James P. Walsh

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12 FISHING COMPANY, INC.

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